IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RALPH CIPRIANO	**CIVIL ACTION NO. 98-4751**
v.	
PHILADELPHIA NEWSPAPERS INC.	
ROBERT ROSENTHAL	
KNIGHT-RIDDER NEWSPAPERS, INC.	

M E M O R A N D U M

Broderick, J. **March 12, 1999**

Plaintiff, Ralph Cipriano ("Plaintiff" or "Cipriano"), brought suit against Defendants Philadelphia Newspapers, Inc. ("PNI"), a Pennsylvania corporation which publishes the Philadelphia Inquirer ("the Inquirer"), Robert Rosenthal ("Rosenthal"), the editor of the Inquirer, and Knight-Ridder Newspapers (Knight-Ridder), Inc., a corporation with its principal place of business located in Miami, Florida which owns PNI. Plaintiff, a former Inquirer reporter, commenced this action by filing an one-count complaint on August 7, 1998 in the Court of Common Pleas of Philadelphia County alleging "malicious defamation" as a result of statements made by Defendant Rosenthal to the Washington Post ("the Post"). Plaintiff filed an amended complaint on August 26, 1998, upon stipulation of the parties, adding three paragraphs under the heading "The Defamatory Comments" which allege that Plaintiff was fired by the Inquirer

in retaliation for the filing of this lawsuit. Am. Compl. at ¶ 62. Plaintiff claims in these paragraphs that the actions of Defendants in firing him are further proof of malice. Am. Compl. at ¶ 63. Plaintiff also alleges that he has been harmed by the malicious conduct of Defendants. Amend. Compl. at ¶ 64. Plaintiff's complaint seeks compensatory and punitive damages for harm caused to his career and reputation by the allegedly defamatory statements made by Defendant Rosenthal while acting in the course of his employment with Defendants PNI and Knight-Ridder.

Defendants filed a notice of removal of Plaintiff's complaint to this Court on September 4, 1998. Defendants claim that this action is removable pursuant to 28 U.S.C. § 1441 as arising under the Court's federal question jurisdiction, 28 U.S.C. § 1331. Defendants argue that, although Plaintiff's complaint appears to be an action for defamation under Pennsylvania state law, Plaintiff's complaint is, in fact, an action arising out a violation of a collective bargaining agreement under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

Defendants thereafter filed a motion to dismiss Plaintiff's amended complaint (Doc. No. 2) for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants contend that Plaintiff's

defamation claim is completely preempted by § 301 of the LMRA as a suit which requires interpretation of a collective bargaining agreement ("CBA"). Defendants argue that Plaintiff's complaint must be dismissed because Plaintiff has not met the exhaustion requirement for a suit under § 301 of the LMRA because he has not pursued his complaint through the grievance procedure contained in the CBA between Defendant PNI and the union to which Plaintiff belonged during his time of employment with PNI.

Before filing a response to Defendants' motion to dismiss, Plaintiff filed a motion to remand this action to the Philadelphia Court of Common Pleas (Doc. No. 3). Plaintiff argues that the instant action is, in fact, simply a suit for defamation under Pennsylvania state law. Plaintiff contends that his action does not arise under the CBA and that no reference to or interpretation of the CBA will be required in order for Plaintiff to prove his case.

Thereafter, Plaintiff filed a response to Defendants' motion to dismiss (Doc. No. 5) and Defendants filed a reply in further support of their motion (Doc. No. 10). Defendants filed a response to Plaintiff's motion to remand (Doc. No. 9) and Plaintiff filed a reply in further support of his motion (Doc. No. 11). Defendants' motion to dismiss and Plaintiff's motion to remand, as well as the responses thereto, are currently before the Court. Because the resolution of both motions turns on this

Court's determination of whether or not Plaintiff's complaint is preempted by § 301 of the LMRA, the Court will consider both motions together. For the reasons stated below, the Court has determined that Plaintiff's defamation claim is not preempted by § 301 of the LMRA. Therefore, the Court will grant Plaintiff's motion to remand this action to the Court of Common Pleas of Philadelphia County and deny Defendants' motion to dismiss.

I. BACKGROUND

The facts underlying this action concerning which there does not appear to be any dispute are taken from Plaintiff's amended complaint and Defendants' notice of removal. Cipriano was employed by the Inquirer as a reporter for eleven years. Am. Compl. at ¶ 8. While he was employed by the Inquirer the terms of his employment were governed by a collective bargaining agreement ("CBA") between PNI and Plaintiff's exclusive bargaining representative, The Newspaper Guild of Greater Philadelphia, Local 10. Not. Remov. at ¶ 4. In the Fall of 1991, Defendant Rosenthal assigned Plaintiff to the "religion beat." Am. Compl. at ¶ 9. While on that beat, Cipriano began an investigation into spending by Cardinal Anthony Bevilacqua, Archbishop of Philadelphia, occurring at the same time that the Archdiocese claimed to be having financial problems which necessitated closing schools and churches in many of

Philadelphia's poor neighborhoods. Am. Compl. at ¶ 10-12. Plaintiff's pursuit of this story led to conflict with Defendant Rosenthal, PNI staff, and officials of the Archdiocese. See, e.g. Am. Compl. at ¶ 13-25. Plaintiff left the "religion beat" shortly after a profile of Cardinal Bevilacqua he had written appeared in the February 7, 1992 Inquirer. Am. Compl. at ¶ 27. Plaintiff wrote an article about the Archdiocese's spending policies under Cardinal Bevilacqua's leadership which appeared in the April 14, 1997 Inquirer. Am. Compl. at ¶ 41. Sometime after the publication of that story, Plaintiff was told by his supervisors not to submit any more articles about the Catholic Church. Not. Remov. at ¶ 9. Plaintiff wrote an article about Archdiocesan spending which was published by the National Catholic Reporter, a national newspaper published by lay Catholics. Am. Compl. at ¶ 52. Shortly before the June 19, 1998 publication date of the National Catholic Reporter article, the Washington Post ("the Post") learned of the impending publication and ran a story on June 13, 1998 about the controversy between Cipriano and the Inquirer regarding the Archdiocese. Am. Compl. at ¶ 52-53. Statements made by Defendant Rosenthal about Plaintiff appeared in the Post story. Am. Compl. at ¶ 54. Specifically, when asked why the Inquirer did not run Cipriano's story, Rosenthal stated that "Cipriano has a very strong personal point of view and an agenda .... There were things that Ralph

wrote that we didn't think were truthful. He could never prove them." Am. Compl. at ¶ 54. The statements by Rosenthal contained in the Post story were republished around the nation by other newspapers, including the City Paper in Philadelphia. Am. Compl. at ¶ 55, 58. After the publication of his statements about Plaintiff in the Post, Defendant Rosenthal sent a letter of explanation to the Post which was published in the Post on July 22, 1998. Am. Compl. at ¶ 57. Plaintiff filed his initial complaint against Defendants on August 7, 1998 alleging that he was defamed by the statements made by Rosenthal and published in the Post article. Shortly after the filing of the complaint in this case, Plaintiff was fired by Defendants. Am. Compl. at ¶ 62, Not. Remov. at ¶ 16.

II. DISCUSSION

An action filed in state court is removable by the defendant if the District Court to which it is removed has original jurisdiction over the action. 28 U.S.C. § 1441. The party seeking removal carries the burden of demonstrating the existence of federal jurisdiction. See Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987), cert. dismissed sub nom., American Standard, Inc. v. Steel Valley Auth., 484 U.S. 1021 (1988). All doubts regarding the propriety of removal are resolved in favor of remand. Id.

Generally, in order for a case to be removable under the Court's federal question jurisdiction, 29 U.S.C. § 1331, a federal cause of action must appear on the face of the plaintiff's "properly pleaded complaint." Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 228 (3d Cir. 1995); see also Gully v. First Nat'l Bank, 299 U.S. 109 (1936). This "well-pleaded complaint rule 'makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance of state law.'" Trans Penn, 50 F.3d at 228 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)). However, the "artful pleading doctrine" permits a Court to look beyond the plaintiff's allegations to the substance of the plaintiff's complaint because a plaintiff "may not defeat removal by failing to plead necessary federal questions." Meier v. Hamilton Standard Elec. Sys., Inc., 748 F. Supp. 296, 299 (E.D.Pa. 1990) (citing Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22 (1983)); see also, Berda v. CBS Inc., 881 F.2d 20, 25 (3d Cir. 1989). One circumstance where a defendant may remove a case notwithstanding the complaint's apparent grounding in state law exists when the state-law claim is "preempted under section 301 of the LMRA." Trans Penn, 50 F.3d at 228 (citing Caterpillar, 482 U.S. at 393).

Therefore, if Plaintiff's claims are preempted by § 301 of the LMRA, the case is properly removed and this Court must exercise jurisdiction over those claims. If, however,

Plaintiff's claims are not preempted by § 301 of the LMRA, then this Court must remand Plaintiff's claim back to state court pursuant to 28 U.S.C. § 1447 because the Court does not have subject matter jurisdiction over Plaintiff's claims.

Section 301 of the LMRA provides a federal cause of action for disputes arising out of collective bargaining agreements. See, e.g. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 228 (3d Cir. 1995). The purpose of § 301 is to create a uniform federal law governing labor disagreements involving collective bargaining agreements in order to protect the expectations of the parties and minimize disruptive influences. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210-11 (1985). Therefore, "[w]hen a suit stating a claim under section 301 is brought, state contract law is displaced, and the collective agreement is interpreted under this federal common law." Breda v. CBS Inc., 881 F.2d 20, 22 (3d Cir. 1989) (citing Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962)).

The Supreme Court has also held that section 301 preemption "extends beyond contract claims and reaches certain claims sounding in tort." Breda, 881 F.2d at 23 (citing Allis-Chalmers, 471 U.S. at 211). The Supreme Court has made clear, however, that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor

law." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985). Therefore, the Supreme Court has developed the following rule:

> if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles--necessarily uniform throughout the Nation--must be employed to resolve the dispute.

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988). Thus, a state law claim is preempted only if the claim is "'substantially dependent on analysis of a collective-bargaining agreement'" or if the claim is based on rights created by the CBA. Lingle, 486 U.S. at 410 n.10 (quoting Electrical Workers v. Hechler, 481 U.S. 851, 859 n.3 (1987). So, "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." Lingle, 486 U.S. at 409-10.

Applying the Supreme Court's analysis, in order to determine whether or not Plaintiff's defamation claim is preempted by § 301 of the LMRA, this Court must look to the elements of defamation under Pennsylvania law and determine whether or not resolution of Plaintiff's defamation action requires interpretation of the CBA. See, e.g. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399

(1988) (retaliatory discharge claim not preempted because, under Illinois law, resolution of the claim would not require interpretation of the CBA); Electrical Workers v. Hechler, 481 U.S. 851, 863 n.5 (1987) (tort claim against union for breach of duty of care preempted because "nature and scope of the duty of care owed" depended on the CBA); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (finding claim of bad faith in handling insurance claim preempted because, under Wisconsin law, the right asserted was defined by the contractual obligation of good faith). Although Defendants allege that Plaintiff's complaint is intended to set forth a claim for retaliatory discharge as well as one for defamation, Plaintiff's complaint, on its face, makes no such claim and Plaintiff seeks no relief for wrongful or retaliatory discharge. The Court will therefore address only Plaintiff's defamation claim.

To establish a claim for defamation in Pennsylvania a plaintiff bears the burden of proving, "when the issue is properly raised," the following elements:

> (1) The defamatory character of the communication.
> (2) Its publication by the defendant.
> (3) Its application to the plaintiff.
> (4) The understanding by the recipient of its defamatory meaning.
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
> (6) Special harm resulting to the plaintiff from its publication.
> (7) Abuse of a conditionally privileged occasion.

42 Pa.C.S. § 8343(a). A defendant bears the burden of proving,

"when the issue is properly raised," the following elements:

> (1) The truth of the defamatory communication.
> (2) The privileged character of the occasion on which it was published.
> (3) The character of the subject matter of defamatory comment as of public concern.

42 Pa.C.S. § 8343(b). Further, when a plaintiff in a defamation action is a public official or a public figure he must also prove by clear and convincing evidence that the defamatory statement was made with "actual malice." See Gertz v. Welch, 418 U.S. 323, 342 (1974). "Actual malice" has been defined by the Supreme Court as knowledge of the falsity of the statement or reckless disregard for the truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

Although Defendants allege that Plaintiff intends to prove that he was defamed by statements other than those which appear in the Post article, Plaintiff's complaint alleges damages and seeks relief only for the statements which appear in the Post and were republished in various other national publications. Therefore, the Court will not address whether or not any other statements by Defendants which are alleged in Plaintiff's complaint but for which no relief is sought could be resolved without interpretation of the collective bargaining agreement. Instead, this Court will restrict its focus to the Post statements.

The Court finds that the allegations of Plaintiff's

complaint that he was defamed by statements published in the Washington Post by Defendant Rosenthal, acting within the scope of his employment with Defendants PNI and Knight-Ridder, can be resolved without interpretation of the CBA. The Court sees no reason why, under the facts of this case, establishing the defamatory nature of the Post statements, the publication of those statements, the application of those statements to Plaintiff, the understanding of the reader regarding the statements and the harm resulting to Plaintiff from publication of the Post statements would require a court or a jury to examine the CBA. In fact, it appears that it is only the issue of a privilege that would arguably require the interpretation of the CBA. However, under the facts of this case, the Court has determined that resolution of the privilege issue will not require interpretation of the CBA.

The Court begins by noting that if the defendant uses the existence of a privilege as a defense, he bears the initial burden of establishing the existence of the privilege. McAndrew v. Scranton Republican Pub. Co., 72 A.2d 780, 785 (Pa. 1950). Once the defendant meets that burden then the burden shifts to the plaintiff to demonstrate that the privilege has been abused. Id. Whether or not Defendants had a privilege to make the Post statements under Pennsylvania law is more properly a matter for determination by the state court. Pennsylvania courts recognize

an absolute privilege for employers to publish to the employee statements in warning and termination letters. See, e.g. Miketic v. Baron, 675 A.2d 324, 327-28 (Pa. Super. 1996). Pennsylvania courts also recognize a conditional privilege for statements which are made "on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause." Miketic, 675 A.2d at 329 (citing Baird v. Dun & Bradstreet, Inc., 285 A.2d 166 (Pa. 1971)). Even when the defendant can prove the existence of a conditional privilege, the plaintiff can establish abuse of that privilege by showing that the publication was brought about by malice on the part of the defendant. Id.

In the instant action Plaintiff alleges that Defendant Rosenthal made public statements about Plaintiff's job performance to a national newspaper. Plaintiff's complaint also includes numerous allegations which Plaintiff contends are sufficient to demonstrate malice on the part of the Defendants to defeat a conditional privilege, if one exists. Defendants allege that the existence of a conditional privilege cannot be resolved without interpretation of the CBA. The Court has, however, determined that the mere fact that Defendants may have a defense to Plaintiff's defamation action is insufficient to preempt Plaintiff's defamation claim where, as here, the allegedly defamatory statements were made publicly and were not made in the course of any grievance proceeding, disciplinary action or

investigation, or any other proceeding required under the CBA. See, e.g. Luecke v. Schnucks Market, Inc., 85 F.3d 356, 359 (8th Cir. 1996)(finding no preemption where employer allegedly implied to other people that workplace accident caused by drug use by the plaintiff); Tellez v. Pacific Gas and Elec. Co., Inc., 817 F.2d 536 (9th Cir.), cert. denied, 484 U.S. 908 (1987)(finding defamation claim not preempted when letter distributed accusing the plaintiff of buying cocaine on the job); Meier v. Hamilton Standard Elec. Sys., Inc., 748 F. Supp. 296, 299 (E.D.Pa. 1990)(finding defamation claim by employee not preempted because statements were allegedly published to persons other than those required to be provided the information under the CBA); Scarpone v. Jesburger, Civ. A. No. 86-6926, 1987 WL 12857 at *3 (E.D.Pa. June 22, 1987)(James McGirr Kelly, J.)(finding defamation claim by employee not preempted when supervisor publicly made allegedly defamatory statements to employee in store in front of customers). On the other hand, if Plaintiff's defamation action arose out of a termination, disciplinary, or grievance proceeding interpretation of the CBA would likely be required. See, e.g., Stafford v. True Temper Sports, 123 F.3d 291, 296 (5th Cir. 1997)(finding preemption when allegedly defamatory statements were made in the course of investigation concerning appropriateness of dismissal); DeCoe v. General Motors Corp., 32 F.3d 212, 216 (6th Cir. 1994)(finding preemption where allegedly

defamatory statements were made in the course of employer's investigation into sexual harassment allegations against the plaintiff); Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1063 (9th Cir. 1989)(defamation claim preempted when based on statements made in discharge notice required under CBA); Furillo v. Dana Corp. Parish Div., 866 F. Supp. 842 (E.D.Pa. 1994)(finding defamation claim preempted when the allegedly defamatory statements were made during the course of the grievance procedure mandated by the CBA). The allegedly defamatory statements in the instant case were not made to Plaintiff. Nor were they part of a grievance hearing, a termination letter, or even an investigation into employee wrong-doing. The statements were not even made to persons within the company or the union. Instead, they were statements about Plaintiff's ability to do his job which were made to the Washington Post in an article about why the Inquirer, Plaintiff's employer, was not publishing one of his stories. Plaintiff was not terminated until after the Post story appeared. In fact, he was not terminated until after he brought the instant defamation action. There is nothing in the collective bargaining agreement that addresses the rights of the parties to make such statements to the press and there is no provision in the collective bargaining agreement which would give Plaintiff the relief that he seeks in this action. Accord Meier v. Hamilton Standard Elec.

Sys., Inc., 748 F. Supp. 296, 299 (E.D.Pa. 1990) (finding no preemption of defamation action where the CBA contained no grievance procedure for defamation claims and no provision for an award of compensatory or punitive damages). Therefore, the Court is of the opinion that Plaintiff's claim for defamation is independent of the collective bargaining agreement between the parties and can be resolved by the state courts without reference to the collective bargaining agreement. Thus, Plaintiff's defamation claim is not preempted by § 301 of the LMRA.

Having determined that Plaintiff's defamation claim against Defendants is not preempted by § 301 of the LMRA the Court must remand Plaintiff's complaint to state court pursuant to 28 U.S.C. § 1447. Section 1447(c) states, in relevant part: "If at any time before final judgment it appears that the district court lacked subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The parties to this action are not diverse and no other basis for federal jurisdiction over this action has been suggested. Therefore, the Court finds that it does not have subject matter jurisdiction over Plaintiff's claims and remands this action to the Court of Common Pleas of Philadelphia County. The resolution of Plaintiff's motion to remand renders further consideration of Defendants' motion to dismiss unnecessary.

Finally, the Plaintiff asks for an award of costs, expenses and attorney's fees incurred by reason of Defendants' removal.

Under 28 U.S.C. § 1447(c) the Court, in entering a remand order, has discretion to make an award of costs and attorney's fees. See Mints v. Education Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996). Section 1447(c) provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). A finding of bad faith is not necessary for a court to make such an award. Mints v. Educational Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996). The Court finds that Defendants' removal petition in the instant action was not "frivolous" or "insubstantial." Mints, 99 F.3d at 1261; see also Thomas v. Hanley, No. Civ. A. 97-2443, 1997 WL 563402 at *7 (E.D.Pa. Sept. 2, 1997)(Rendell, J.). The Court also finds that an award of costs and fees is not warranted in this case since the "nonremovability of this action was not obvious." Scarpone v. Jesburger, Civ. A. No. 86-6926, 1987 WL 12857 at *3 (E.D.Pa. June 22, 1987)(James McGirr Kelly, J.).

Thus, the Court will grant Plaintiff's motion to remand (Doc. No. 3) and deny Defendants' motion to dismiss (Doc. No. 2). The Court will deny Plaintiff's request for an award of costs and fees.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF PENNSYLVANIA

RALPH CIPRIANO	**CIVIL ACTION**
	NO. 98-4751
v.	
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ROBERT ROSENTHAL	
KNIGHT-RIDDER NEWSPAPERS, INC.	

ORDER

AND NOW, this 12th day of March, 1999; Defendants having removed this action from the Court of Common Pleas of Philadelphia County; Plaintiff having filed a motion to remand this action to that court; Defendants having filed a motion to dismiss Plaintiff's amended complaint; these motions and the responses and replies thereto being presently before the Court; for the reasons stated in this Court's Memorandum of March 12,

1999, the Court having found that remand is necessary pursuant to 28 U.S.C. § 1447(c) because this Court does not have subject matter jurisdiction over Plaintiff's defamation claim in that Plaintiff's defamation claim is not preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185;

IT IS ORDERED that Plaintiff's motion to remand this action to the Court of Common Pleas of Philadelphia County (Doc. No. 3) is **GRANTED**;

IT IS FURTHER ORDERED that Defendants' motion to dismiss Plaintiff's amended complaint for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. No. 2) is **DENIED**;

IT IS FURTHER ORDERED that Plaintiff's request for an award of costs and fees incurred in this Court by reason of the removal is **DENIED**;

IT IS FURTHER ORDERED that the Clerk of the Court shall mail a certified copy of this Order to the Prothonotary of the Court of Common Pleas of Philadelphia County pursuant to 28 U.S.C. § 1447(c).

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RAYMOND J. BRODERICK, J.